Supreme Court of the United States

No. [illegible], OCTOBER TERM, [illegible]

THOMAS HAMMERSCHMIDT et al,
Petitioners,

vs

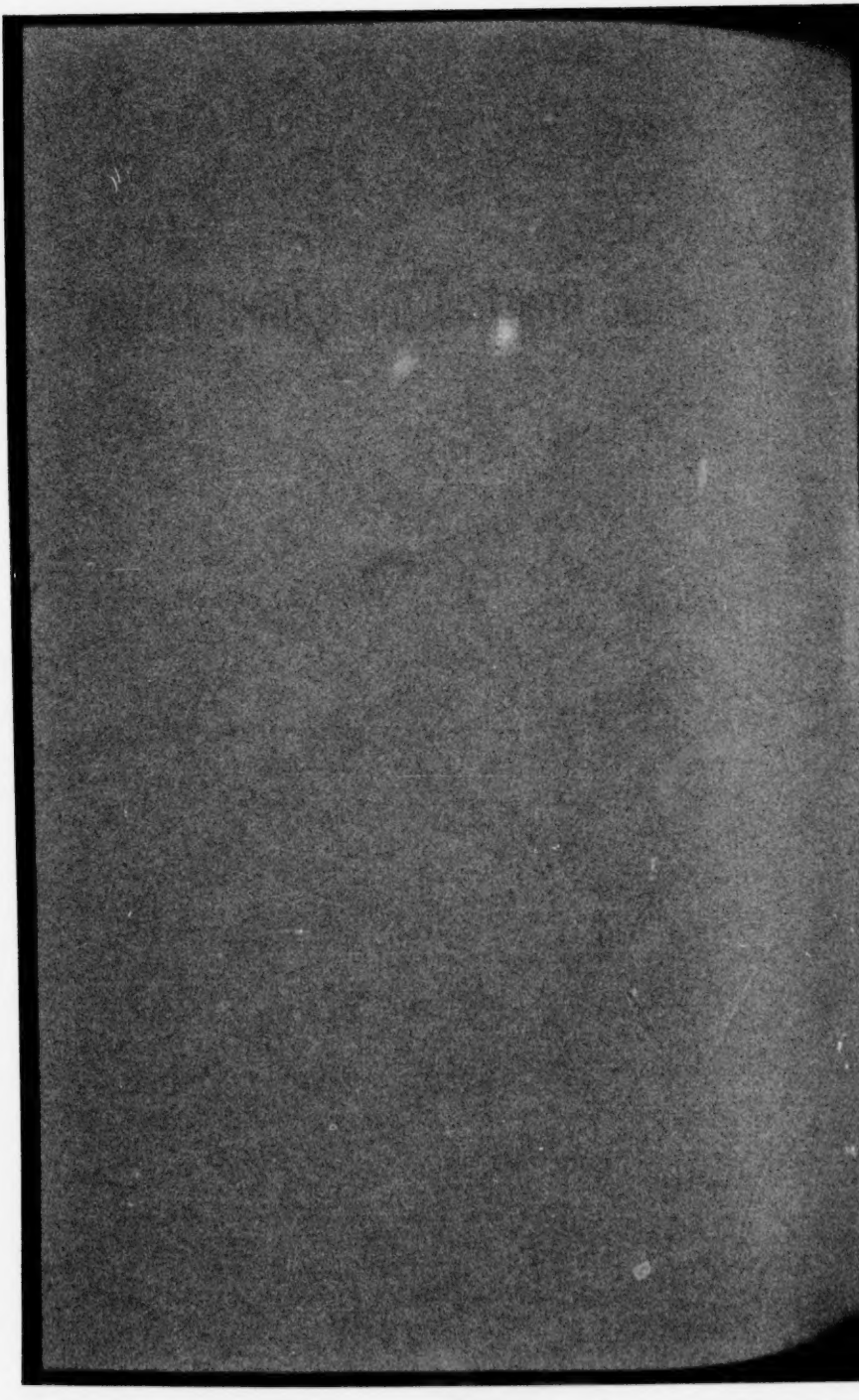
THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS.

ED. F. ALEXANDER,
JOSEPH W. SHARTS,
Counsel for Petitioners.

COURT INDEX PRESS, [illegible] MAIN, CINCINNATI [illegible] December, [illegible]



INDEX.

AUTHORITIES CITED.

Supreme Court of the United States

THOMAS HAMMERSCHMIDT ET AL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Brief for Petitioners

I.

PRELIMINARY STATEMENT.

This cause comes into this court by *writ of certiorari* to the Circuit Court of Appeals for the Sixth Circuit. The said court, by divided vote, affirmed the conviction of plaintiffs in error in the District Court for the Southern District of Ohio, Western Division, on a charge of conspiracy to defraud the United States (U. S. Penal Code, Sec. 37). The trial in the District Court took nearly three weeks and a large number of errors were assigned in the Circuit Court of Appeals. The petition for the writ in this court was based on the sole ground that the demurrer to the indictment should have been sustained. This was likewise the ground on which the dissenting judge in the Circuit Court based his dissent, and will be the only ground urged in this brief.

The indictment follows:

(N. B. It will be noted that the alleged acts of the indictment took place May 27th to June 1, 1917, being before the enactment of the Espionage Law and other war laws.)

II.

INDICTMENT. (Rec., pp. 1-3.)

"First Count, Section 37, Penal Code.

"The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Western Division of the Southern District of Ohio, at the October Term thereof, in the year nineteen hundred and seventeen, and inquiring for that division and district, upon their oaths annd affirmations present:

"That on or about, to-wit, the twenty-seventh day of May, in the year nineteen hundred and seventeen, in the City of Cincinnati, in the State of Ohio, and in the Western Division of the Southern Judicial District of Ohio and within the jurisdiction of this Court, Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Philip Rothenbusch, Arthur Tiedtke, Walter Gregory, John Hahn and Alfred Welker, in this indictment hereafter called defendants, did then and there knowingly, wilfully and unlawfully conspire, combine, confederate and agree together among themselves and with each other and with divers other persons to said Grand Jurors unknown, to defraud the United States by impairing, obstructing and defeating a lawful function of the Government of the United States, to-wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the Act of Congress passed May 18, 1917, entitled 'An Act to authorize the President to Increase Temporarily the Military Establishment of the United States' and the lawful proclamations and regu-

lations promulgated under the provisions of said Act, by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, hand bills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counseling, advising, aiding and procuring said persons, especially said male persons between the ages of twenty-one and thirty, both inclusive, to evade and refuse to obey the requirements of said Act of Congress, by which said Act and the proclamations and regulations promulgated thereunder, said persons were required to present themselves for and submit to registration under the provisions of said Act and the proclamations and regulations promulgated thereunder.

"And the Grand Jurors further present that to effect the object of said conspiracy and in furtherance thereof the said Thomas Hammerschmidt and Lotta Burke did, on or about the twenty-seventh day of May, in the year nineteen hundred and seventeen, for themselves and the other defendants herein, order from the Queen Card Company, a partnership composed by Thomas A. Foster and Floyd H. Kelley, which said partnership was then and there engaged in the printing business in said City of Cincinnati, Hamilton County, Ohio, aforesaid, the printing of a certain lot of fifty thousand hand bills, circulars or dodgers, which said hand bills, circulars or dodgers were each in the letters, figures, form and style as the following, which is an exact copy and is inserted herein and made a part of this indictment:

DOWN WITH CONSCRIPTION

The First Amendment to the Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of SPEECH, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

CONSCRIPTION IS THE WORST FORM OF INVOLUNTARY SERVITUDE

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in the war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesmen, said this of conscription, in Congress of this country December 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents.....compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect to trample down and destroy the dearest right of personal liberty."

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalist of this country, should

REFUSE TO REGISTER FOR CONSCRIPTION

The Socialist party of Ohio has shown the way in the fight against conscription by adoption of this resoluton:

"Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing 'involuntary servitude,' in violation of the thirteenth amendment of the constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class."

One of the millions of leaflets issued by the Socialist Party.
SOCIALIST PARTY OF OHIO—1291 Cook Ave., Lakewood, O.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Lotta Burke, and other persons the exact names and number of whom is unknown to this Grand Jury, on or about, to-wit, the thirty-first day of May, in the year nineteen hundred and seventeen, called for and received about eighteen thousand of the above described lot of handbills, circulars and dodgers from the said The Queen Card Company, with the intent and for the purpose of distributing and publishing said handbills, circulars and dodgers, and causing the same to be distributed and published as aforesaid.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Charles Thiemann, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one Susan Jeffries, and to various other persons unknown to this Grand Jury, by leaving at the residence of said Susan Jeffries and said various other persons, copies of the aforesaid handbill or circular beginning 'Down With Conscription,' a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Frank Reis, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one Henry J. Dickhouse, and to various other persons unknown to this Grand

Jury, copies of the aforesaid handbill or circular beginning with 'Down With Conscription' a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

"And the Grand Jurors also present that to further effect the object of said conspiracy the said Walter Gregory, on or about, to-wit, the first day of June, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Court, did publish, distribute and give away to one William Steele, and to various other persons to these Grand Jurors unknown, copies of the aforesaid handbill or circular beginning 'Down With Conscription,' a copy of which is hereinbefore inserted and made a part of this indictment and to which inserted copy, for brevity and further particularity, reference is hereby made.

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

III.

Analysis of Indictment.

The indictment may be analyzed as follows, using the terminology employed by the pleader:

1. Offense Charged.

(a) Defendants conspired to defraud the United States.

(b) by impairing, obstructing and defeating a lawful function of the Government of the United States,

(c) to-wit, the registration for military service, etc.

2. Description of Conspiracy.

(a) By printing, publishing, displaying and distributing,

(b) to various persons, especially males between the ages of twenty-one and thirty,

(c) handbills, circulars, dodgers and other literature,

(d) *composed, printed, intended and designed for the purpose of* counseling * * *, to evade and refuse to obey the requirements of the Conscription Act.

(N. B. The indictment does not allege that any specific circular was agreed on either in *haec verba* or in substance.)

3. Overt Acts.

(a) The ordering of the printing of a specific circular by two of the defendants,

(b) obtaining from the printer eighteen thousand copies of said specific circular, by one of the defendants,

(c), (d), (e) delivering copies of said specific circular to Susan Jeffries, Henry J. Dickhouse and William J. Steele.

(N. B. There is no allegation that any of these three persons was subject to the registration act.)

IV.

Questions Arising on the Indictment.

In the light of the foregoing analysis, three questions of law present themselves:

1st. Do the alleged acts constitute a conspiracy to defraud the United States?

2nd. Does the conspiracy charge set forth anything more than the conclusion of the pleader as to intended conspiratous handbills not set out either in *haec verba* or in substance?

3rd. Does the application of the conspiracy statute to the alleged facts of the indictment contravene the First Amendment to the United States Constitution?

V.

Conspiracy to Defraud.

The only offense charged here is "conspiracy to defraud the United States.' This offense is alleged to have consisted in an attempt to print and distribute *handbills and other literature 'designed for the purpose of coun-counseling, etc.'* refusal to obey the conscription act. The government to make its use of the word "defraud" clear charged the offense not simply as a "conspiracy to defraud the United States" but as a "conspiracy to defraud the United States by impairing, obstructing and defeating a lawful function of the government of the United States," these words being taken almost verbatim from *Haas* v. *Henkel*, 216 U. S., 462, 479, as follows:

> "But it is not essential that such a conspiracy shall contemplate a financial loss, or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government."

The validity of the indictment is made to rest on the foregoing language of the Supreme Court. Similar counts have been sustained on the strength of the same citation, in *U. S.* v. *Galleanni*, 245 Fed., 977, and in *Firth* v. *U. S.*, 253 Fed., 36 (C. C. A., 4),

(V a) HAAS v. HENKEL, 216 U. S., 462, 479.

An examination of *Haas* v. *Henkel* shows that there is at least no similarity of the facts of that case to those of the instant case. In that case, Haas conspired with an employee of the Department of Agriculture to obtain from him information as to crop prospects in advance of the regular publication, and to have the published reports falsified. On the strength of these arrangements Haas expected to speculate on the cotton market. The defendants claimed that the government had suffered no loss and could therefore not have been defrauded. The court, however, held that frauds on the government were not necessarily financial, using the language set forth under V.

(V b) THE GOVERNMENT'S APPLICATION OF HAAS v. HENKEL.

The government, in effect, claims that the language of *Haas* v. *Henkel,* as set forth above, extended the meaning of the word "defraud" as applied to government to cover any form of opposition to any "function of the United States" as here opposition to the registration under the conscription act on the claimed ground of unconstitutionality.

(V c) COROLLARIES OF THE GOVERNMENT'S POSITION.

Atwell, in his excellent work on Federal Criminal Law, says at page 219, "One of the most useful and comprehensive statutes in the old revision was Section 5440, which is re-enacted in the New Code in Section 37." Atwell was, of course, a district attorney. One can understand the holy joy of a district attorney in contem-

plation of a "useful and comprehensive" statute which enables him to bring to trial for their supposed criminal intentions, crooks whose provable acts have not transgressed the law. But Atwell, at the time of writing his book, (in 1911), could not have realized half the comprehensiveness of Section 37, if the decision herein stands. For under this decision, the statute reaches not only crooks but all persons, foolish, stubborn or merely liberty-loving, who may give the officials of the government trouble of any kind.

When thirty years ago certain persons refused to pay income tax on the ground that the law was unconstitutional, they might, under the decision herein, have been charged with a conspiracy to defraud the United States by interfering with a lawful function, to-wit, the collection of income tax; and had the Supreme Court's decision sustained the tax, they would have been guilty. The same might be said of the North Carolina employers of child labor a few years ago. The railway officials who some years ago refused to obey the Adamson Law until the Supreme Court sustained it, were clearly guilty. It is claimed that certain provisions of the Esch-Cummins law are being disregarded by certain railways as unconstitutional. If so, their officials ought at this moment to be under indictment for conspiring to defraud the United States. Any resistance and almost any kind of objection to a law of questionable constitutionality would be an attempt to defraud the United States. The signers of the Declaration of Independence were guilty not only of treason and rebellion but of conspiracy to defraud the government of Great Britain. Daniel Webster and the New England secessionists during the War of 1812 were in a conspiracy to defraud the United States; likewise,

John Greenleaf Whittier and James Russell Lowell during the War with Mexico; likewise the armies of the Southern Confederacy. They could all have been charged with conspiring to impair, obstruct or defeat functions of the government, in the sense claimed by the government here.

To pursue the matter further, resistance or objection to any bureau or bureau regulation would be "impairing, etc.," a lawful function. Organizations for the benefit of soldiers and other special groups in the community would constantly fall foul of the rule. If the government owned the railroads or other public utility, resistance to any rate schedule on the ground of unfairness or illegality would be a conspiracy to defraud the United States.

It does not require any great imagination to realize the danger to constitutional government in such an interpretation of the conspiracy statute. Almost any kind of agitation against governmental activities, even criticism of them, would lay the author open to at least a *prima facie* charge of conspiracy to defraud the United States. The deadening effect of such a situation is too horrible to contemplate. There would be few men of spirit who would not be on the district attorney's list, and it would be impossible to keep this a "government of law and not of men."

If it should be said that it would be intolerable that persons should be able to interfere with the operation of a law during the period in which its constitutionality was being considered, the answer would be that ample penalties are usually provided, where necessary, to discourage any foolish or insincere raising of constitutional or legal questions. It might further be said that Congress

is not helpless. It can and generally does enact laws to meet situations that may arise. It is not the duty of courts to give unusual and far-fetched meanings to general statutes in order to cover particular situations which Congress either never contemplated or perhaps ignored.

(V d) Fallacy of the Government's Position.

In the case of *Cohens* v. *Virginia,* 6 Wheat., 264, 399, it was said by Chief Justice Marshall, that "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

The facts of *Haas* v. *Henkel* have already been referred to. They have no similarity to the facts here. As stated by Judge Denison in his dissenting opinion below (Rec., p. 43), (referring to *Haas* v. *Henkel*), "It was not claimed in argument or suggested in opinion (unless in the quoted phrase) that a conspiracy to defraud which lacked the element of financial loss, did not still necessarily imply some chicanery. The conduct of Holmes and Haas was thoroughly "crooked," and this connotes fraud in the ordinary sense of that word."

The court therefore may re-examine the entire question of conspiracy to defraud with reference to the facts of this case and, if necessary, modify the definition laid down in *Haas* v. *Henkel.*

(V d 1) Ordinary Meaning of Defraud.

Section 37 of the Penal Code uses the word "defraud" without explanation. In enacting the statute years ago,

Congress certainly did not have before it the meaning deduced by the government in this case from *Haas* v. *Henkel*. Shall the courts at this time by interpretation write something into the statute which was not there?

It is said in *Settle* v. *Van Evrea*, 49 N. Y., 281,

> "A fundamental rule, in the interpretation tion of written laws or instruments of any kind, is to construe them according to the sense of the terms and the intention of the framers of the laws or parties to the instruments. That intention is first to be sought from the words employed, and if the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation."

What then is the ordinary use of the word "defraud"? Webster's International Dictionary defines it as follows:

> "to deprive of some right, interest or property by a deceitful device; to cheat; to overreach."

These meanings are sufficient to cover every judicial interpretation of "fraud" or "defraud" with the exception of the decision herein and in the two similar war cases previously referred to.

Prior to these cases, the extreme application of the term "defraud" was perhaps the holding in *Horman* v. *U. S.*, 116 Fed., 350 (C. C. A., 6). In that case it was held that a scheme to obtain money by blackmail, to-wit, by threatening to expose certain alleged criminal conduct of the victim, was a scheme to defraud and that the use of the mails for such a scheme came within Section 215 of the Penal Code. The court in that case said, "A scheme or artifice to defraud is not limited in its

meaning to such as are to be accomplished by means of deception or trickery." The court apparently seemed to think there was no deception or trickery in the scheme. Counsel are disposed to believe that the scheme could fairly have been called a piece of trickery, but passing that question, there can be no doubt but that it was a scheme to "cheat" and that it had in it the elements of "crookedness" and dishonesty, that it was, in a word, "fraudulent."

(V d 2) Lawful Functions of the Government.

Counsel, thus far, have argued the broad principle that the doctrine of the lower court is untenable on fundamental principles without regard to deductions from general statements of law, such as that in *Haas* v. *Henkel*, based on dissimilar facts. Counsel believe, however, that even the language of *Haas* v. *Henkel* has been incorrectly applied here by the government and the majority opinion of the lower court.

The government says this was a conspiracy "to impair, etc., a lawful function of the government, to-wit, registration." To bring this within the *Haas* v. *Henkel* rule, we must interpret it as though it had read "the lawful functions of a department of the government, to wit, the department of military registration." Now what were the functions of the registration officials? The government would argue that the function of these officials was to register every male within the prescribed ages and that the alleged acts of these defendants interfered with this function. But is this accurate?

Ordinarily we might be tempted to say that the function of a prize-fighter is to defeat his opponent. As it is his opponent's function to defeat him, apparently one

or the other will fail to perform his function on this basis. Obviously there is a fallacy somewhere and the fallacy is clearly in the original assumption. It is the aim of the prize fighter to win but not his function. His function is to do everything he is capable of, within the rules, to win. His opponent's efforts thus in no way interfere with his functions.

In a similar way it is a fallacy to argue that opposition to registration was an impairment of the functions of the registration officials as contemplated by *Haas* v. *Henkel*. As in the case of the prize-fighter aim and function are confused. The functions of the registration officials might be said to have been substantially the following:

(1) To register all who presented themselves;

(2) To discover and cause the apprehension of persons seeking to evade the law:

(3) To pass on exemption claims;

(4) To submit their lists to the military authorities.

The defendants interfered with none of the functions of the registration officials. So far as these defendants were concerned, the government received from its officials every service to which it was entitled.

Had the defendants sought to bribe or otherwise cause the registration officials to do less than their duty, this would have been an attempt to impair a lawful function and would have been a fraud on the United States under *Haas* v. *Henkel*, and *would have been a fraud in fact.*

The distinction made herein may be more clearly apprehended by substituting a civil corporation in place of the government. Let us assume that the Steel Trust or the Meat Trust for the purpose of achieving some economy or for the accomplishment of some other pur-

pose of its efficiency department, should call on all its employees to fill out certain registration blanks in which they were required to set forth details as to age, ancestry, religion, previous employment, health, habits of life, etc. This might be likened to the Conscription Act passed by Congress. Every official of the corporation having to do with the registration would correspond to the registration officials under the act of Congress; the body of employees of the corporation would correspond to those liable to the military conscription act. As in the case of the government, the corporation would be entitled to the loyal service of all its employees in its registration department. Any attempt to persuade these employees while remaining in the corporation's employ, to fall short of this loyalty, by either failing to do acts which they were bound to do, or by doing acts contrary to what they were bound to do, would be an attempt to defraud the corporation by depriving it of services to which it was entitled and which it was being led to believe it was getting. However, supposing that some group of the employees or some union representing some of the employees were to issue a statement to the employees setting forth that the corporation had no legal right to make inquisitorial investigations of this character and that all employees who believed in the dignity and manhood of American labor should refuse to obey the orders as to registration. According to the doctrine laid down by the decision below, this would be a conspiracy to defraud the corporation by impairing, obstructing or defeating a lawful function of the corporation. The absurdity of such a claim is too manifest to require argument. On the other hand, there would clearly be an attempt to defraud the corporation if the malcontents were

to bribe the registering officials of the corporation to accept false or incomplete answers or to overlook the failure of certain employees to answer at all. This would be "impairing, obstructing or defeating a lawful function of a department" of the corporation.

On the basis of the foregoing, counsel believe that both law and common sense require the interpretation placed by the government upon the definition in *Haas* v. *Henkel* to be rejected as untenable.

(V d 3) No Attempt in Haas v. Henkel to Define "Fraud."

In conclusion as to *Haas* v. *Henkel*, it may fairly be said that the court was really making no attempt in that case to define "defraud." There could be no question about the fraud there. A fraud was clearly being planned on those dealing in the market with Haas, and the machinery of the government was being dishonestly used to accomplish the fraud. The only question before the court was whether this particular fraud was legally a fraud on the United States, and the court correctly held that, the United States being entitled to have its officials do the things which they were employed to do and which they were supposed to be doing, any scheme which, with fraudulent intent, sought to have them betray or fall short of their duty, was a fraud on the United States. Unfortunately, the language used was capable superficially of being interpreted to mean that fraud was not a necessary element in a conspiracy to defraud the United States.

VI.

The Conspiracy Charge is Inadequate.

Aside from the question of fraud, however, counsel believe that the conspiracy charge itself is defective. An indictment for conspiracy under Section 37, consists of two parts; first, the allegations describing the plan of the conspiracy; second, the allegations as to overt acts. These two parts are necessarily distinct and independent, and each must be complete. The gravamen of the charge is the conspiracy; the overt acts merely comply with the evidential requirements of the statute.

A careful examination of the indictment in this case reveals the fact that the defendants are charged merely with conspiring to print and distribute "handbills, circulars, dodgers and other *literature, composed, printed, intended and designed for the purpose of counseling, etc.,* * * * to evade, and refuse to obey the requirements of said act of Congress." The conspiracy as set forth does not include any particular handbill or other literature for none is alleged either in *haec verba* or even in substance. The overt acts part of the indictment alleges that the printing of a specific handbill was ordered by two of the defendants and that three others of them each distributed a copy, but this circular is in no way referred to in the conspiracy charge as having been agreed on.

What then does the indictment intend to charge? Can it be sustained as a mere charge of intention to print something of a certain tendency without agreeing on anything in particular to be printed? But would this be a completed conspiracy ready for business? Obviously not. Some step would remain to be taken before

there could be anything to act on. The would-be conspirators would have a common idea but no common plan. Any member or members of the group publishing some handbill of their own might be acting on their conception of the idea but they would not be carrying out any plan of the group.

Or does the indictment intend to charge that the defendants actually planned the circular which some of them printed and distributed? It does not say so and criminal indictments must be strictly construed. Furthermore, it has time and again been held that when, in an indictment for conspiracy, the government intends to rely for conviction on a specific document, the document must be set forth "*in haec verba,*" if a copy is available, or in substance, if a copy cannot be obtained. *Hughes Fed. Procedure*, p. 39; *Foster Fed. Practice*, Vol. 2, p. 1668; *U. S.* v. *Noelke*, 1 Fed., 426, 432; *U. S.* v. *Green*, 136 Fed., 618, 643; *U. S.* v. *Watson*, 17 Fed., 146, 149.

Nor can the conspiracy charge be helped out by guesses founded on the overt acts portion of the indictment where the conspiracy charge does not itself refer to the overt acts for definiteness. The case of *Joplin Mercantile Co.* v. *U. S.*, 236 U. S., 531, is directly in point. In that case, the indictment charged a conspiracy to commit an offense "by introducing intoxicating liquor into the Indian country which was formerly Indian Territory, and is now a portion of the state of Oklahoma." The overt acts allegations charged the delivery of liquor in Joplin, Missouri, for transportation into Tulsa, Oklahoma. The court say, at page 535, "that clause of the indictment which sets forth the conspiracy does not in terms allege, as a part of it, that the liquor was to be brought from without the state of Oklahoma; nor does

this clause refer for light upon its meaning to the clauses that set forth the overt acts. Hence we do not think the latter clauses can be resorted to in aid of the averments of the former." And *Joplin Mercantile Co.* v. *U. S.* merely followed the rule laid down in *U. S.* v. *Britton*, 108 U. S., 199, 205.

The validity of this indictment was argued three times before the late Hon. Howard C. Hollister on motion to quash, and three separate opinions were delivered by him (Rec., p. 6, p. 11, p. 12). In his first opinion, Judge Hollister sustained the motion in the following language (Rec., p. 8):

> "The charge does not set out the circular, etc., agreed to be printed and published, nor does it refer to any clause where it may be found, and we have nothing in the charge itself from which to determine whether or not the circular could have the effect alleged or not, whether as to persons within the draft age or as to 'various persons,' whatever that description may mean. The indictment sets out the pleader's conclusion, but fails to set out that from which his conclusion is drawn. The circulars, etc., designed and composed, as set forth, were a part of the conspiracy itself and the charge of conspiracy is not complete until the entire agreement is set forth. Hence it would seem logically, that the first part of the offense—the conspiracy—is not sufficiently alleged. It is true that in that part of the indictment stating the alleged first overt act, we find a printed circular inserted and 'made a part of this indictment,' but there is nothing to show that that circular is the circular, etc., alleged in the charge of conspiracy to have been composed, printed, etc., advising evasion of the draft law."

The government thus had its attention directed to the weakness of this indictment at an early stage. Judge Hollister's opinion would indicate that he expected the government to prepare a stronger indictment (Rec., p. 11). Whether for lack of evidence or for other reasons, the government chose not to change the indictment. Instead, it insisted on a rehearing and persuaded the court to reverse itself. Counsel submit that Judge Hollister was correct in his first opinion and that the objections which he raised to the indictment have not been overcome either by his own subsequent opinions or by the decision of the Circuit Court of Appeals.

VI.

The Indictment and the Free Speech Amendment.

Even if it were to be assumed that this indictment actually charged a conspiracy to print and distribute the specific circular set forth in connection with the first overt act, which it carefully omits to do, and even if the term "defraud" could be stretched to cover frank opposition to activities of the government or its officials, counsel would still maintain that this indictment must fail.

The circular set forth, given its fullest effect, did nothing more than denounce the Conscription Act as a fundamental invasion of the constitutional rights of American citizens, and to call on all who agreed with its principles, to uphold what Daniel Webster called "the dearest right of personal liberty," by refusing to submit to this unconstitutional infringement of vital personal rights. It did not advocate lawlessness of any kind. It merely maintained that, in refusing to register, citizens would be within their constitutional rights and it promised the

financial and moral support of the Socialist Party of Ohio to back them up in this stand.

At the time of its issue, the argument of the circular was at least plausible in its claim that involuntary service in the United States army, particularly in a war on foreign soil, was essentially involuntary servitude, as thoroughgoing in its control of the conduct, habits and life of the individual as any involuntary servitude could possibly be. Six or seven months later, the Supreme Court sustained conscription and the question was closed as a matter of law.

Wherein lay the offense of the circular? Judge Denison in his dissenting opinion below says (Rec., p. 41):

> "The Selective Service Act, so called (Act of May 18, 1917; 40 Stats., 76), and the proclamations pursuant to it required registration on June 5, 1917, of all young men between 21 and 31. The law evidently contemplated a compulsory military service outside the United States. These respondents thought that such requirement was unconstitutional, and that their constitutional right of free speech permitted them to say so. Their ideas were unsound, but it had not then been expressly so decided; and their claims were, in the abstract, at least as plausible as those commonly made, that courts may not adjudge any law invalid as unconstitutional, and that an injunction obstructing what defendants think are their constitutional rights need not be obeyed, and such claims are not punished; but the existing state of war made these respondents' concrete conduct disloyal and intolerable. There was no law directly forbidding it (this was before the Espionage Act of June 15, 1917), and so they were indicted under Sec. 37 of the Penal Code."

In effect, Judge Denison says that no law was violated, but that the conduct of the defendants was "disloyal and intolerable," and that, apparently, Section 37 was stretched to meet what the District Attorney considered the necessities of the occasion. Loyalty and disloyalty are, of course, broad terms and relative in their meaning. The government can punish treason, and treason as an offense is carefully defined. Loyalty is faithfulness to an idea whether that idea is the American government or American principles or something else. The original authors of the circular here undoubtedly believed themselves loyal to American principles of law and freedom as fully as the members of the Second Continental Congress believed themselves loyal to English principles of law and freedom.

Paradox though it may seem, every government owes its virility and strength to the opposition to it which is stirred up when it attempts some far reaching new assumption of power or permits evils to accumulate until they become insufferable. The colonists who refused to obey the "Stamp Act" were true Englishmen and they would have been true Englishmen even had they failed in their contentions, for it was only by opposition of their kind that the merits and demerits of the Stamp act and the philosophy of government that lay behind it, could be tested. The glory of a nation lies not in the meek submission of its subjects to any disposition of their lives and liberties the government may make; it lies rather in the recognition and protection of fundamental individual rights and in the ability of its citizens to assert those rights, when attacked, even against the officials of the government.

The introduction of military conscription into the United States was a tremendous departure from American and English traditions of government. Free governments, we had always fondly believed, had but to call on their citizens and more than enough volunteers would spring up to meet any emergency. Conscription in the Civil War had been tried on a small scale, but it was hateful and unproductive of results. On the continent of Europe it had established itself in countries used to large applications of paternalism and socialism. Was it to be wondered at that the passage of the draft law by Congress should stir up tremendous protest? Probably a majority of the people were against the law. More than a third of Congress opposed it, including many of the leaders and nearly, if not quite, a majority of the President's own party. If, under these circumstances, there had been no protest, would it have been to the credit of America? Would we not have been branded as a race of sheep, humbly bowing to anything government might impose, the Europeanized successors of the individualists of '76 and '61?

Let America be grateful that the protest was made, even though it had to be overridden. In the end, the people of America agreed that the protestants were wrong, that in a tremendous struggle like the World War, the country must become a vast commune in which the lives and liberties of all citizens must be subject to the authority which claims to act for all.

And if, in the next world war, Congress should decide that not only the lives and liberties but even the property of the people should be placed in the communal reservoir, it is to be expected and hoped that there will be some protest, some objection, so that the wisdom or un-

wisdom of such a course can be adequately considered and decided upon; for it is of the essence of free government that it should encourage protest and investigate its grounds rather than that it should make protest impossible and thus deprive itself of the enlightenment which opposition alone can bring.

The first amendment to the Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. It is safe to say that when Congress adopted the conspiracy statute it had not the remotest suspicion that it was interfering with free speech. Yet the government contends in this case that the conspiracy statute prohibited these defendants and others from expressing their arguments against the constitutionality of the system of military conscription.

VIII.

CONCLUSIONS.

On the basis of the foregoing, counsel submit the following conclusions as to the indictment herein:

1st. That the indictment fails to charge any facts constituting fraudulent conduct or attempted fraudulent conduct on the part of plaintiffs in error.

2nd. That fraud is a necessary element in conspiracy to defraud the United States.

3rd. That the definition of "conspiracy to defraud" in *Haas* v. *Henkel* (216 U. S., 462, 479), was never intended to apply to facts like those in this indictment, and does not, in fact, apply to them.

4th. That the conspiracy charge of the indictment fails to charge a completed plan of conspiracy and sets forth merely the conclusions of the pleader.

5th. That the application of the conspiracy statute to this indictment constitutes a violation of the first amendment to the United States Constitution.

6th. That the demurrer to the indictment should have been sustained, and that the judgments heretofore rendered should be reversed and the indictment dismissed.

Respectfully submitted,

ED. F. ALEXANDER,
JOSEPH W. SHARTS,
Counsel for Petitioners.